No. 83-1571

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

WILLIAM M. RADIGAN - - - - Petitioner

versus

SUPREME COURT OF KENTUCKY - Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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The Respondent, Supreme Court of Kentucky, prays that the Court will deny the petition for a writ of certiorari to review the opinion and order of Respondent entered in this proceeding on November 2, 1983.

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to those constitutional provisions previously set forth by Petitioner, the following provisions of the Constitution of the Commonwealth of Kentucky are also involved.

Section 109 of the Kentucky Constitution provides, in relevant part, as follows:

> The judicial power of the commonwealth shall be vested exclusively in one Court of Justice which shall be divided into a Supreme Court, a Court of Appeals, a trial court of general jurisdiction known

as the Circuit Court and a trial court of limited jurisdiction known as the District Court.

Section 115 of the Kentucky Constitution provides, in relevant part, as follows:

> Procedural rules shall provide for expeditious and inexpensive appeals.

Section 116 of the Kentucky Constitution provides, in relevant part, as follows:

> The Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, . . . and rules of practice and procedure for the Court of Justice.

COUNTERSTATEMENT OF THE CASE

While the factual account of the events leading up to this present controversy is for the most part correct as supplied by Petitioner, there are some very crucial inaccuracies which must be corrected. For the purpose of clarifying the events at the October 26, 1983, show cause hearing before the Supreme Court of Kentucky, a transcript of that hearing is provided in the appendix to this brief. (Hereinafter cited as "T.R. ——") This show cause hearing was necessitated by Petitioner's failure to file a brief at the end of his *third* extension of time in which to file, Petitioner having had two extensions of time prior to the one which was granted subject to an order to show cause if the brief was not then filed.

Both in his statement of the case and in his arguments, Petitioner attempts to paint himself as having

been caught on the horns of a dilemma from which there was no escape. He states that he was under *both* the show cause order of the Kentucky Supreme Court and "a similar order from the Kentucky Court of Appeals". (Petition, p. 5) In actuality, Petitioner was under only one show cause order, that one issued by Respondent Supreme Court of Kentucky. This Petitioner admitted in oral argument at the show cause hearing (T.R., p. 4, response to question by Justice Wintersheimer) and is reflected by the Kentucky Court of Appeals order to which he referred (see, order of the Kentucky Court of Appeals entered 9/7/83 in the case of *Green* v. *Commonwealth,* Appendix, p. 50). In point of fact, Petitioner had briefs due in both the Court of Appeals and the Kentucky Supreme Court, yet he chose to ignore the latter in order to complete work on the former. Even past that, the record in the Court of Appeals reflects that Petitioner was given still another extension for the filing of the brief which he says he chose to complete rather than working on *Herald* as per the order of the Supreme Court. (Court of Appeals, Order of 10/31/83, Appendix, p. 51) Indeed, in the course of oral argument before the Supreme Court, Petitioner stated that he did not even begin to work on the *Herald* case (the matter then pending before the Kentucky Supreme Court) until the date on which his Supreme Court brief was required by the show cause order to be filed. (T.R. 6, response to question by Justice Vance) Thereafter, he completed work in only ten days on the *Herald* brief and he filed it 103 days after it was initially due.

Having thus portrayed himself factually as an innocent caught in a web of circumstances from which he could not extract himself, Petitioner proceeds in his statement of the case to allege some eleven respects—two more than in his list of "questions presented" — in which the Supreme Court of Kentucky has denied him due process of law, both substantive and procedural, as viewed from every direction conceivable. While asserting that these myriad due process violations (including every aspect known to modern constitutional law, with the possible exception of pre-judgment attachment without notice) were asserted in a timely fashion, Petitioner significantly omits to state that not one of these objections was raised before or at the show cause hearing but that all were first raised by Petitioner in his motion to reconsider. With such a plethora of constitutional rights in the hands of one obviously experienced in criminal advocacy, it is difficult to envision why none were earlier raised.

Factually, one cannot but be amazed at these current proceedings. Petitioner has, by his own version, found himself caught up in terrible time constraints by the pressures of his position at the Office of Public Advocacy and the conflict of those time pressures with the procedural rules formulated by the Kentucky Supreme Court. Although his statement of the case alludes to such employment, it omits to state that he is no longer so employed; thus another tangle like the current one seems highly unlikely for Petitioner. Despite that fact, Petitioner continues to assert before this Court these purported constitutional issues, all in the

context of a punishment by fine of one hundred dollars, even which small amount was suspended. If all of this is to survive summary dismissal under the doctrine of *de minimum non curat lex,* then there must be some more substantial controversy lurking here than meets the eye. Indeed, there are other issues, all of which point to the conclusion that this Court should deny the petition for the writ of certiorari.

SUMMARY OF ARGUMENT

I. *The petition for writ of certiorari should be denied because it was an appropriate exercise of the contempt power by the Supreme Court of Kentucky.* Petitioner has placed himself in a position in which he almost asked deliberately to be held in contempt of court. His actions have undermined the Supreme Court of Kentucky's ability and duty, as manifested in the Constitution of the Commonwealth of Kentucky, to control the appellate processes of the state. Petitioner's efforts have been at the expense of his client, who languished in jail while his appeal was delayed. For those reasons, Petitioner was quite rightly held in contempt of court by the Supreme Court of Kentucky.

II. *The petition for a writ of certiorari should be denied because it is sought on frivolous grounds.* It is the contention of the Supreme Court of Kentucky that Petitioner has not sought the writ of certiorari to vindicate any violation of his constitutional rights but rather to subvert the ability of the Kentucky court system to control the flow of appeals being prosecuted by publicly funded counsel. Petitioner apparently

seeks to obtain relief in this proceeding so that it can be combined with the Sixth Circuit holding in *Cleaver* v. *Bordenkircher,* 634 F. 2d 1010 (6th Cir., 1980). The net result of the two proceedings, should the outcome be favorable to Petitioner, would be to leave the Kentucky Supreme Court either unable to force the expeditious treatment of appeals on its docket or to embroil it in a controversy with the executive and legislative branches of state government.

III. *The petition for a writ of certiorari should be denied because none of the due process rights of Petitioner were violated by Respondent in holding him in contempt of court.* Every aspect of procedural fairness was observed by the Supreme Court of Kentucky in adjudging Petitioner guilty of criminal contempt of court. He was given fair notice that he might be held in contempt. With the matter governed by state law and the penalty being only $100, the distinction between criminal and civil contempt is constitutionally irrelevant, although any reasonable practitioner would have perceived that the contemplated contempt was criminal in nature. Petitioner was given a full and fair opportunity to defend himself before an impartial tribunal and the decision therein is based upon substantial and credible evidence.

REASONS FOR DENIAL OF THE WRIT

I. The Holding of Petitioner in Criminal Contempt was an Appropriate Exercise of the Contempt Power by the Supreme Court of Kentucky.

It was the duty of the Supreme Court of Kentucky to see that the claims of indigents were processed

promptly so that persons with meritorious appeals would not languish in jail due to the derelictions of their counsel. The normal, orderly process of the Court was blocked by the actions of Petitioner and it was exactly for that act that he was quite correctly adjudged in criminal contempt.

In the brief section of his argument addressed to the propriety of the exercise of the contempt power in this case by the Kentucky Supreme Court, Petitioner asserts that the exercise of the contempt power in this fact setting is an attempt by the Kentucky Supreme Court to interfere with the attorney-client relationship and to chill the zealous advocacy of all counsel. Petitioner states that his contempt conviction "sent a message" to the practicing Bar in Kentucky—the message being that the Kentucky Supreme Court would not dismiss criminal appeals for failure of a timely filing but that it would punish attorneys who did not comply with the orders of the Court to file briefs. Significantly lacking in both assertions by Petitioner is any mention of a federal constitutional ground which would invalidate the action taken by Respondent in punishing Petitioner for criminal contempt of the Kentucky Supreme Court. Whatever may be the restrictions applicable to the federal courts in disciplinary proceedings (*In Re Bithoney,* 486 F. 2d 319 [1st Cir., 1973]), Petitioner has not asserted any federal grounds which would prevent the Supreme Court of Kentucky from sanctioning *its* practitioners, through the contempt power, for disobeying the rules of the state.

In his latter assertion, however, there is more than a grain of truth; indeed, a message *was* sent to the practicing Bar and to Petitioner in particular, by the Kentucky Supreme Court. The message sent by the Kentucky Supreme Court was that there is an end to the patience of the Court and that *all* appeals must be processed in a speedy, expeditious fashion, in accordance with the rules and orders of the Court. It was a message deliberately sent and it is the position of the Kentucky Supreme Court that its action in sending such a message was not only justified but was absolutely necessary.

As will be set forth in more detail *infra*, the Supreme Court of Kentucky is faced with having to deal with "no-choice" motions when publicly provided defense counsel move for extension of time for the filing of their appellate briefs. The imposition of the federal requirement in *Cleaver, supra,* makes it wasteful of the time and efforts of all involved for the Kentucky court system to deny such motions and dismiss the appeals. Thus, the *only* control which is left to Kentucky in such cases is to apply sanctions against the attorneys who willfully refuse to follow the briefing schedules which the Kentucky Supreme Court is *required* by state law to impose.

Those lawyers who practice before the Supreme Court of the United States have little doubt as to how swift will be the punishment and how awesome will be the consequence for willful disobedience of the orders of this Court. The paucity of case law attests to the effectiveness of that certainty in controlling the proc-

esses of this Court. Even the President of the United States has shown obedience to the lawful orders of this Court rather tthan risking disobedience. *Nixon* v. *United States*, 418 U. S. 683 (1974). *This Court* would not tolerate for a moment the tactics which Petitioner has practiced before the Supreme Court of Kentucky. If this Court should deny to the Supreme Court of Kentucky the power to punish Petitioner for the contempt which he seems deliberately to have sought, then *this Court* will be sending a message to the practicing members of the Kentucky Bar and every other state bar in the United States. That message will be that in the publicly funded defense of criminal defendants, *there are no rules.* That message would be as applicable to federal proceedings as to state proceedings, to trial proceedings as to appellate proceedings, and to private defense as to publicly funded defense; there would then be no limit to the power which Petitioner and other like him would assert. There should be no mistake about it. This attack upon the contempt power of the Kentucky Supreme Court is a major attack upon the integrity of the judicial process by Petitioner and others similarly situated who seek to bend the rules of the system to their own ends. Surely this Court cannot leave the Supreme Court of Kentucky in such a position of helplessness against this attack; therefore, the Petition for Writ of Certiorari should be denied by the Court.

II. The Petition for the Writ Should Be Denied as Having Been Sought on Frivolous Grounds.

The currently pending petition for the writ of certiorari should be denied on the grounds, demonstrated *infra,* that the due process — contempt arguments are frivolous. Of even more importance to the maintenance of judicial integrity is that this proceeding is apparently pressed by Petitioner not to vindicate his due proces rights but rather to usurp the power of the Supreme Court of Kentucky to control the process of moving cases through the state's appellate structure. In Kentucky, the power to make rules applicable to such proceedings is vested by Section 116 of the Kentucky Constitution in the Supreme Court of Kentucky. Indeed, in regard to appellate proceedings, the Supreme Court of Kentucky is *required* to provide rules which will "provide for expeditious and inexpensive appeals". Ky. Const. §115. This is a power which has been held to be *exclusively* within the judicial power in Kentucky, excluding even interference by the Kentucky legislature. *Commonwealth* v. *Schumacher,* 566 S. W. 2d 762 (Ky. App., 1978) Indeed, it would be fair to say that this case is *not* about due process but in reality about a power struggle over control of the process of appellate advocacy in public counsel criminal cases.

The issue which lurks behind this case is that of effective assistance of counsel requirements for criminal appeals being handled by the Office of Public Advocacy. In regard to the situation in Kentucky, the leading federal case on point is *Cleaver* v. *Borden-*

kircher, 634 F. 2d 1010 (6th Cir., 1980). In that case, the Sixth Circuit upheld the issuance of a writ of *habeas corpus* to a prisoner whose appeal had been dismissed when his publicly supplied counsel was denied an extension of time in which to file an appeal brief. The holding was based upon the Sixth Circuit's conclusion that the Sixth Amendment right to counsel was denied when such extension was denied to an attorney whose caseload made it physically impossible for him to file in a timely fashion. In so doing, the Circuit relied upon *Anders* v. *California,* 386 U. S. 738 (1967) and *Douglas* v. *California,* 372 U. S. 353 (1963).

While Petitioner was acting as appellate counsel in the *Herald* case, he sought three thirty day extensions and one ten day extension of time in which to file his brief. In his motions for those extensions, Petitioner relied implicitly upon the Sixth Circuit holding in *Cleaver.* Indeed, the heart of his motions for extensions was a verbatim quote from the motion of the public defender involved in *Cleaver.* (See, motions in Appendix, pp. 52-54, 56-58, 60-62, 64-67, and *Cleaver, supra* at 1011) Thus, in filing his extension motions, Petitioner was stating that his motion *had* to be granted or his client would, under *Cleaver,* be denied effective assistance of counsel. As Justice Leibson of the Kentucky Supreme Court very aptly put it, the "motion" wasn't a "motion at all. (It was) an order because of . . . *Cleaver,* . . . we're in a position where we can't deny the motion . . . without, in essence, being a release order for the prisoners". (T.R. 26, remarks by Justice Leibson)

Now, with this petition for writ of certiorari, Petitioner has in effect "dropped the other shoe". The cloak of constitutional "questions" presented does not hide the substance of his ploy. With *Cleaver* already available as a pedestal, Petitioner asks this Court to hold, in effect, that counsel cannot be constitutionally penalized for failure to file, thereby elevating the Office of Public Advocacy beyond the reach of time constraints. According to this argument, *his client,* could not constitutionally be penalized for a failure to file, *Petitioner* could not constitutionally be penalized for a failure to file and, as if by magic, any time constraints upon Petitioner disappeared. Of even greater significance is that not only would time constraints disappear, the ability of the Supreme Court of Kentucky to regulate the state's inferior courts and the Supreme Court's own processes would similarly disappear. At stake in this case is no less than the question of whether the time periods for filing appeals for criminal indigents in the Kentucky court system will be controlled by the Kentucky Supreme Court or by the Petitioner and those similarly situated.

Indeed, there is no reason to think that the question is limited to time periods for filing appeals, for similar tactics would seem equally effective in such other matters as length of the appellate brief, length of time assigned for oral argument and most of the other rules of procedure applicable to the processing of appeals. Furthermore, there is no reason to suppose that the tactics here utilized are limited to the Kentucky court system or even to all the other state court systems in the United

States. Petitioner has already imported his tactics to *this* Court; viewing the case now as a review of a criminal conviction, Petitioner has requested and secured an extension of the time in which to file his petition for the writ of certiorari.

Assuming that what Petitioner really seeks in this proceeding is an ability to set his own time schedule for the filing of criminal appeal briefs for indigents, was there any alternative open to the Kentucky Supreme Court other than the holding of Petitioner in contempt? In his colloquy with the Kentucky Supreme Court about his dilemma of too heavy a caseload, Petitioner suggested that all this might be solved if his office had more attorneys and a larger budget. (T.R. p. 21, response to question by Justice Liebson) In support of his position, Petitioner has now submitted the affidavit of his supervisor, Mark A. Posnansky, which states in effect that his office has a growing caseload and is under a hiring freeze which prevented the replacement of attorneys who have left the office. Quite correctly seeing the end to which Petitioner was moving in this portion of the oral argument, Justice Stephenson of the Kentucky Supreme Court observed that the court had no power to secure for the Office of Public Advocacy any relief as to its budget or its staffing, stating that "We (the Supreme Court of Kentucky) have no control over that". (T.R. p. 21, remark by Justice Stephenson) The Petition for the writ of certiarari should be denied in this case because the petition is frivolous and a sham; it has been undertaken not to vindicate anyone's due process

rights but rather to attempt to secure the aid of the Court in coercing the Supreme Court of Kentucky into Petitioner's plan.

The Petitioner in this case appears deliberately to have put himself into a position in which the Supreme Court of Kentucky was forced to make a choice among three alternatives: (1) to give up on taking any action against Petitioner, which action when combined with *Cleaver* would leave the control of the Court's processes virtually in the hands of Petitioner and his colleagues. (2) to embroil itself into the processes of the executive and legislative branches of the Kentucky state government by *ordering* that the hiring freeze imposed by the Governor of the state not be applied to Petitioner's office and that the Kentucky General Assembly appropriate more money for that office; or (3) to hold Petitioner in contempt. It must be obvious that the abdication of control of the judicial process was an unacceptable alternative, not just for the Kentucky Supreme Court or any other state court, but for this Court as well. Neither was the second alternative appropriate to a state as firmly committed to the doctrine of separation of powers as is Kentucky, and it would seem equally unacceptable should the tactic be imported to the federal system. *See, Ex Parte Auditor of Public Accounts,* 609 S. W. 2d 682 (Ky., 1980) Thus, only the third alternative remained. It must be concluded that Petitioner deliberately put himself into the position to force that choice, that the choice came out the only way that *any* reasonable appellate court would have chosen and that Petitioner should not be now

allowed either to escape the fruits of his attempt or to foist those unacceptable alternatives onto the Kentucky Supreme Court through the help of this Court.

III. Petitioner Was Afforded Due Process of Law in the Proceeding Below Before the Supreme Court of Kentucky.

The ability of the Kentucky Supreme Court, both under state and federal law, to punish for contempt is well settled.

> "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently, to the due administration of justice". *Ex Parte Robinson,* 86 U. S. 506, 509 (1874).

"And such is the recognized doctrine in reference to the powers of the courts of the several States". *Ex Parte Terry,* 128 U. S. 298, 303 (1888). Similarly, it is well settled in both state and federal practice that such power is activated by the issuance of a "rule" or a "show cause order". *Ex Parte Robinson, supra,* utilized a show cause order in federal practice and the practice in Kentucky at least dates back to *In Re Woolley,* 74 Ky. 95 (1874), in which such procedure was utilized by the state's then highest court, the Court of Appeals. There are literally hundred of reported cases in the federal and state systems in the United States which have used the practice continuously since the founding of this country.

It is, however, worthwhile to keep in mind one very crucial difference between the state and federal systems as they relate to the contempt power. Despite the fact that many federal cases speak of the authority to punish for contempt as being inherent in the federal courts, there has long been federal legislation applicable to that contempt power. *See,* 18 U.S.C. 401. This federal statutory dimension, which is criminal in nature, probably explains in part the long search by this Court for a meaningful distinction between civil and criminal contempts. In the state of Kentucky, there is no legislation which applies any such limits or restrictions upon the contempt power of the judiciary. As a result of this, many of the federal cases cited by Petitioner will have no applicability to the question at hand. Often a federal case will apply a restrictive view of contempt, not because of any federal constitutional requirement but because of a federal statutory requirement. *See, e.g., In Re McConnell,* 370 U. S. 230 (1962) The effect of this will mean that only those United States Supreme Court decisions reviewing state contempt proceedings and those federal decisions based on federal constitutional requirements are here on point. In regard to that latter category, even those cases may be of limited authority given the possibility that the due process clause of the Fifth Amendment (which is the constitutional source in federal contempts) may not be exactly mirrored by the requirement of due process under the Fourteenth Amendment (which is the constitutional source in state contempts).

A. PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE PARTICIPATION IN THE DECISION BELOW OF JUDGES WHO ISSUED THE SHOW CAUSE ORDER.

In the current proceedings, Petitioner attempts to resurrect in federal guise his previously advanced state law argument that all the judges of the Kentucky Supreme Court who participated in the issuance of the show cause order were mandatorily disqualfied from sitting in judgment on the question of whether Petitioner was in contempt of that order for his admitted failure to file in the period set by the order. What Petitioner is attempting to suggest is that those judges had become so embroiled in the controversy that, as in the case of *Taylor* v. *Hayes,* 418 U. S. 488 (1974), they had lost the detachment necessary to rule fairly on the issue. To use the phrase long ago adopted by Mr. Justice Holmes speaking for this Court in *United States* v. *Shipp,* 203 U. S. 571, 574 (1906), Petitioner "has . . . suggested that the court is a party . . .". In there upholding the ability of the United States Supreme Court to pass on the question of whether there was contempt in violation of *its own order,* Mr. Justice Holmes stated:

> The court is not a party. There is nothing that affects the judges in their own persons. Their concern is only that the law should be obeyed and enforced, and their interest is no other than that they represent in every case. *Id.*

It strains credibility to suggest that the current case resembles in any way those contempt cases in which

a trial court judge became embroiled in a controversy with trial counsel so that the securing of another judge to pass on the contempt was necessary. It was under that fact setting that this Court found the usage of a separate judge necessary in *Mayberry* v. *Pennsylvania*, 400 U. S. 455 (1971). To apply that rule to the current facts would be a quantum leap forward in the law and one which would be ill-advised. Mr. Justice Holmes long ago rejected the notion that this Court could be so deprived of its power and there is not the slightest reason to change that position now; by the same token, this Court should not deny to the Supreme Court of Kentucky that same power to control its own integrity.

B. PETITIONER'S DUE PROCEES RIGHTS WERE NOT VIOLATED BY HIS HAVING BEEN HELD IN CRIMINAL CONTEMPT RATHER THAN CIVIL CONTEMPT BY RESPONDENT.

Petitioner professes to have been denied his due process rights because, he says, the show cause order did not specify that he might be held in criminal contempt for its violation. Even if the distinction between civil and criminal contempt is meaningful, neither Petitioner nor any other practicing attorney could reasonably have had *any* doubt that the contempt which was contemplated was criminal. In the first place, the show cause order clearly states that counsel will be required to show cause why *he* (counsel) should not he held in contempt. An attorney given notice that *he* might be held in contempt should have little doubt that it is criminal contempt, because civil contempts

against lawyers are relatively rare. *See, e.g., Hickman* v. *Taylor,* 329 U. S. 495 (1947).

Even without the red flag of a personal warning, still a practicing attorney should have recognized the criminal nature of the impending proceedings. In Kentucky, as in every other American state and in the federal practice, the theoretical distinction between the two is easily seen:

> Civil contempts are those quasi contempts which consist in failure to do something which the contemnor is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court, while criminal contempts are all acts in disrespect of the court or its process which obstruct the administration of justice, or tend to bring the court into disrepute. *Jones* v. *Commonwealth,* 308 Ky. 233, 213 S. W. 2d 983, 985 (Ky., 1948).

In these facts, a reasonable practicing attorney would realize that civil contempt was an impossibility. The production of a brief by Petitioner was *not* to the advantage of the other party, the Commonwealth. Petitioner's client was in jail serving his sentence and the filing of a brief was in no way advantageous to the Commonwealth; indeed it was only a *filing* which could be *dis*advantageous to the Commonwealth. In actuality, the only *party* to the action who could possibly benefit from the Court's order was Joseph Herald, Petitioner's client. Certainly, the Commonwealth was not to be aided by Petitioner's filing in the same sense that the United States would have been aided by the

grand jury testimony of the alleged contemnor in *Shillitani* v. *United States*, 384 U. S. 364 (1966). On the other hand, the continued failure of Petitioner to file his brief was certainly an abuse of the rules and procedures of the Kentucky Supreme Court.

Even if it were assumed that a practicing attorney of Petitioner's experience could not tell from the face of the show cause order that criminal contempt was contemplated, there should be absolutely no doubt as to the nature of the proceeding when he appeared in the Kentucky Supreme Court on October 26, 1983. At that time, his brief had been tendered. Thus, there was no longer any action to be performed which could be secured by the show cause hearing. By no stretch of the imagination could action have been taken at that hearing which would have been of advantage to the opposing party, the Commonwealth. In light of that reality, what *could* Petitioner have thought was the reason for the hearing on that date? The only question then open was whether his failure to comply could be excused on any sort of reasonable basis. He failed to provide that basis and thus was held in contempt. At that time, if at no other, Petitioner had surely been provided with notice to an absolute certainty that this was "a charge, and not a suit." *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418, 446 (1911)

This Court should note, too, that whatever *theoretical* importance the criminal-civil distinction might have in Kentucky, it is insignificant as a *practical* matter. In modern dealings with the special problems posed in the area of contempt. Kentucky's highest

court has observed that such proceedings are in a class by themselves, involving unique aspects, and that attempts to apply ordinary rules of practice and procedure simply cause confusion. *Levisa Stone Corp.* v. *Hayes,* 429 S. W. 2d 413 (Ky., 1968). In the absence of the existence of a criminal statute such as 18 U.S.C. 401, there would seem to be little reason for a state to mirror the great importance placed in the federal system on the distinction between civil and criminal contempt.

Kentucky's highest court finally decided in 1972 to abandon the attempt to maintain a practical distinction between civil and criminal contempt, noting that "the long and tortuous effort of the courts to classify contempts as civil or criminal has been a fruitless search for the impossible". *Miller* v. *Vettiner,* 481 S. W. 2d 32, 34 (Ky., 1972) Rather than distinguishing between civil and criminal contempt, the Kentucky court has noted that "[t]he important distinction to be drawn, it seems to us, is between those contempts for which a person cannot be jailed or fined without a jury trial and those for which he can". *Id.* at 35. Since it is clear that the punishment imposed on Petitioner here did not rise to the level necessary to require a jury trial set by *Bloom* v. *Illinois,* 391 U. S. 194 (1968), it follows that the distinction between the types of contempt is of no importance under state law, and this Court should not reimpose upon the state its long-since abandoned search for a distinction between the two types of contempt.

C. PETITIONER WAS GIVEN AMPLE OPPORTUNITY TO DEFEND HIMSELF AT THE SHOW CAUSE HEARING PRIOR TO HIS BEING HELD IN CONTEMPT BY RESPONDENT.

Among his various due process arguments, Petitioner contends that the proceeding before the Kentucky Supreme Court on October 26 violated due process in that he was not given an adequate opportunity to defend himself. The facts on that date bespeak exactly the opposite. Petitioner was present, he knew the act for which he had to answer, he presented his excuses for that act and he presented his superior in support of his position. To analogize those facts to the absolute disallowance of a defense opportunity in *Groppi* v. *Leslie,* 404 U. S. 496 (1972), transcends credulity.

D. THE ORDER OF RESPONDENT THAT PETITIONER FILE HIS BRIEF BY OCTOBER 11, 1983, WAS CAPABLE OF BEING OBEYED BY PETITIONER AND HIS DISOBEDIENCE WAS WILLFUL.

Similarly, Petitioner's argument that he was put under an order which was physically impossible to obey is of no merit. He says that he received notice of the final "ten day extension" on October 3, that the brief admittedly would require ten days to write and thus he could not possibly have complied by October 11 as required in the show cause order. This is an incredible distortion of the facts. His brief for *Herald* was originally due on July 11, 1983; on that date, he requested (Motion 7/11/83, Appendix, pp. 52-54) and later received (Order 7/29/83, Appendix, p. 55) an ex-

tension for thirty days, thus running to August 19, 1983. On August 10, he moved for (Motion 8/10/83, Appendix, pp. 56-58) and again later received (Order 8/24/83, Appendix, p. 59) a thirty day extension, thus running to September 9, 1983. On September 9, Petitioner again requested a thirty day extension (Motion 9/9/83, Appendix, pp. 60-62), to run until October 9, which would have been a Sunday. The October 3 show cause order (Order 10/3/83, Appendix, p. 63) was in response to the motion of September 9 and gave Petitioner until October *11*, two days longer than he had requested in his motion. The October 3 order was *not* an eight day extension, as Petitioner contends; it was the thirty day (plus two) extension which Petitioner had earlier sought. Thus, the show cause order which Petitioner says he could not possibly have obeyed (because it gave him only eight days to do ten days of work) would have been impossible *only* because on October 3 Petitioner had not done the first bit of work on the brief. In fact, it was not until eight days later, on October 11, the day the brief was due, that Petitioner first checked out the record in the *Herald* case. It was for exactly that reason that Petitioner was held in contempt. He had sought extension after extension, yet he had not even then examined the record in the case. Petitioner wants to construct a case of impossibility but the only thing which made compliance impossible was his own action. Surely a person cannot create his own impossibility and then escape any responsibility for it by pleading its existence.

E. PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE PRESUMPTIONS AND ALLOCATIONS OF BURDEN OF PROOF APPLIED BY RESPONDENT.

It is difficult to respond to the hodge-podge of arguments which Petitioner makes concerning the appropriate standard of proof and allocation of burden of proof in a contempt proceeding. Those are matters which might assume significance in the setting of a contempt penalty necessitating a trial by jury (i.e., one involving punishment by fine in excess of $500 or imprisonment for more than six months). *See, e.g., Bloom* v. *Illinois, supra.* For the Petitioner to analogize to these facts from the holding of this Court in regard to the imposition of a *death sentence* in *Gardner* v. *Florida,* 430 U. S. 349 (1977) is surely to stretch even the most tenuous of arguments past the breaking point. In this "misdemeanor" variety of contempt, it is difficult to imagine how Petitioner envisions this standard and allocation should have functioned. It would seem absurd to require the highest court of a state to in effect charge itself as a trial judge would charge a jury. No guidance is provided by Petitioner's citations to an involuntary psychiatric commitment proceeding (*Addington* v. *Texas,* 441 U. S. 418 [1979]) or to a juvenile criminal proceeding (*In Re Winship,* 397 U. S. 358 [1970]). Petitioner suggests that the Court should have engaged in the presumption that he had complied with the October 3 order. The suggestion is patently absurd since the records of the Court themselves show that no brief was filed on October 11 and consequently that the show cause order had been

disobeyed. Even now, it still is factually clear that the brief was *not* filed by October 11. If Petitioner is suggesting that the filing of his motion (Motion 10/11/83, Appendix, pp. 64-67) on October 11 for still another extension was compliance with the show cause order, a response seems unnecessary; the show cause order required a *brief, not a motion* and everyone in this proceeding must admit that no such brief was received on October 11. That the Supreme Court of Kentucky, or anyone in the world for that matter, should have engaged in a presumption which was so obviously false is a proposition for which Petitioner offers no support; indeed, to do so would be to depart from reality and into some sort of Alice in Wonderland domain.

In this case, the *facts* showed that Petitioner did not comply with the October 3 order of the Supreme Court of Kentucky. That is a truth not denied by Petitioner at the show cause hearing and cannot now be denied by Petitioner. These facts seem far removed from the single, heat of the moment outburst by an attorney which this Court held insufficient to justify a contempt in *Eaton* v. *Tulsa,* 415 U. S. 697 (1974). It is a *fact* that Petitioner appeared at a hearing before the Supreme Court of Kentucky to offer his explanation, that he knew that the purpose of his being there was to offer such explanation and that he made no request, past his own "testimony" and that of his superior, to offer any proof in his own defense. That is a truth which Petitioner cannot now deny. It is a *fact* that the highest court of the state of Kentucky found his explanation insufficient to excuse the dis-

obedience which Petitioner admitted and still must admit. Far from being lacking in (as Petitioner terms it) "competent, probative evidence", the record in this case does not present *any* factual difficulties; the record is factually clear. From the facts which are here beyond contest, it certainly must be said that a reasonable trier of fact could have concluded that Petitioner was in contempt and that is a conclusion which this Court should not disturb. *Cf. Harris* v. *United States,* 404 U.S. 1232 (1971); *Vachon* v. *New Hampshire,* 414 U. S. 478 (1974); *Jackson* v. *Virginia,* 443 U. S. 307 (1979) Neither does the case present the sort of constitutional difficulties which Petitioner has advanced to the Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should deny the Petition for Writ of Certiorari and let stand the decision of Respondent Supreme Court of Kentucky holding Petitioner in contempt of that court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John R. Leathers, counsel of record for Respondent, hereby certify that forty (40) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari was mailed to the Office of the Clerk of the United States Supreme Court, Washington, D.C., 20543; Hon. J. Vincent Aprile II, 2520 Meadow Road, Louisville, Kentucky, 40205, Counsel for Petitioner; and to Hon. David L. Armstrong, Attorney General, Capitol Building, Frankfort, Kentucky, 40601; this the 20th day of April, 1984, by my personally depositing same in a United States mailbox, first class postage prepaid. I further certify that all parties reqired to be served have been served.

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APPENDIX

IN THE

SUPREME COURT OF KENTUCKY

No. 83-SC-866-I

IN RE: WILLIAM M. RADIGAN

TRANSCRIPT OF HEARING
October 26, 1983

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Chief Justice Stephens: The purpose of this hearing is to show cause, where Mr. Radigan will attempt to explain, to show cause why he should not be punished for contempt for not filing an order of this court, or complying an order of this court, vis-a-vis the filing of brief on a certain time. I talked to the court and, and, certainly, Mr. Radigan, you can go ahead and make whatever explanations that you want. I've also, with permission of the court, Mr. Isaacs, let you say something, a very limited amount, but I think, Mr. Radigan, take the stand, as it were.

Mr. Radigan: Thank you, your honor. I think that I can explain the situation in one very simple word, and it's caseload. Unfortunately, the Department of Public Advocacy, which requires the handling of all indigent briefs under statutes, at the present time, has fewer public attorneys than it has had in the last five years. At the same time, we've seen an increase of over, from my figures that I'm familiar with, over one hundred percent number of appeals in the last two years. Essentially, what we're faced with is a glut of appeals and too few attorneys, at the same time, operating under a—

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Justice Vance: Mr. Radigan, let me interrupt you just a minute.

Mr. Radigan: Certainly, Justice Vance.

Justice Vance: Do you, is it true, then, when you're talking about the caseload, that if it had not been for the caseload, you could have complied with this order to get the brief in in time?

Mr. Radigan: Well, for instance, your honor, I had a very simple situation. At the time that I was, the order was entered on this case, I was under a similar order from the Court of Appeals of Kentucky, in a brief that I had already started working on.

Justice Aker: A contempt order?

Justice Leibson: Show cause order?

Mr. Radigan: It's a show cause type order, yes, your honor. And I was attempting to get that brief finished, at the same time that this court's order came out. It was simply physically impossible for me to get, timewise, to get any type of preparation done on this brief to comply with this court's order.

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Justice Wintersheimer: Mr. Radigan, this is the first time that we've heard that from you, and I think, I don't know of any other document that you have submitted here that said, I'm under other order by another court to show cause.

Mr. Radigan: Well, it was not, it was, specifically, not a show cause order. The Court of Appeals is proceeding under the type of manner in which they were saying that no further extensions will be granted.

Justice Vance: It was not a show cause order, then?

Mr. Radigan: It was not, specifically, a show cause.

Justice Vance: This was the only one that was a show cause order?

Mr. Radigan: That's correct, your honor.

Justice Vance: And you elected to do something else rather than this?

Mr. Radigan: No. your honor. My experience with the Court of Appeals, and they've done this in the past, is that, if you do not file that brief, after they

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say that there is, this is the last extension that will be granted, they had the record show cause appearance in the past. That was why I was operating under that assumption. But, no, I was not trying to delay on this case. If you'll examine the pleadings that I have filed, as far as the extension motions, you'll see, first of all that, even though the record in this case was received by this court on June 10th, I did not become assigned to the case until July 5th. The thirty day original period of time had already nearly run by the time I got the case. Since July 5th, I filed, including up to the tendering of Mr. Harold's brief to this court on last Friday, I filed a total of 14 appellant briefs in this court and the Court of Appeals of Kentucky and several briefs in the Federal District Court one in the Sixth Circuit.

Justice Vance: What did you do from the time you got the show cause order on down until the day that this brief was due?

Mr. Radigan: I began work, I completed working on that Court of Appeals brief. I had a discretionary review brief that was due on the Monday after this court issued a show cause order. I then proceeded to

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begin working on this case. I completed this case within ten days of beginning it. And I, the very simple explana-

tion is this, we had too many cases, and not enough time, and not enough attorneys.

Justice Vance: You commenced, you completed this case within ten days from when you began on it?

Mr. Radigan: When I began rea—

Justice Vance: And you were ten days late, and so, therefore, you did not even begin on it until the thing was due, under the order.

Mr. Radigan: That's correct, your honor. I had no opportunity, no ability to do that. My caseload and work and other—

Justice Leibson: Was there any reason why you wouldn't file with us, then, earlier than October 11, some explanation? I find it extremely unacceptable, completely unacceptable would probably be a better terminology, this business of filing for an extension on the last day in the, that the, when the brief is due. I cannot believe that, is there a good reason why a brief can't be completed by a certain time, they're not known before the day the brief is due.

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Mr. Radigan: That is very possibly true, Justice Leibson.

Justice Wintersheimer: Well, you just said that you know all about this workload problem. And the problem assignment in the internal operating procedures of the Public Defender, Advocate's Office. So you knew all that in advance.

Mr. Radigan: If it was up, if it was my option, I would file, in the beginning, a motion for a sixty day extension on every case.

Justice Wintersheimer: Why isn't it your option?

Mr. Radigan: Because we have been instructed, through court personnel of this court, not to file a sixty

day extension motions and only to request thirty days at a time. If that's, I mean, if you would like us to file for larger extensions at the beginning, I would be glad to convey the message back. But we have been operating under the information, that we should file only for thirty day extensions.

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Justice Leibson: What we would like is, that you tell us, when you can tell us, with integrity, when the brief can be filed, and that you, then perform according to the representation. That is what we would like.

Mr. Radigan: Now, would this be in the manner of filing an extension motion, say for sixty days right at the beginning?

Justice Leibson: Why should you do that unless you know then that there is some reason why you are going to need an extension?

Mr. Radigan: Well, I know, for instance, that I had a brief to do before this court, tomorrow, next week, and in the Court of Appeals the week after that. The problem that I have right now is that, until I begin examining the record of the case, that I do not know how long it will take to, for me to prepare the brief on that case. I simply do not know. It could be a very short record, with extensive issues, that will take an extensive amount of time to research and to prepare the brief; or it could be a long record with sub—, a very simple issue in it, that, once I completed

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reading the record and setting out the statement of facts, it might take me less than a day to prepare the actual argument itself. I cannot say until I've begun to read a record and prepare and analyze the issues and research them, how long it will take me in a specific case.

Justice Gant: May I ask you a couple of things?

Mr. Radigan: Certainly, Justice Gant.

Justice Gant: First, I abhor automatic thirty or automatic sixty days. I think the extension should relate to the case itself and not, that's just a principle, but you said something about the fact that this case was not assigned to you until, actually until after the show cause was entered. Is that correct?

Mr. Radigan: No, no, no, no. It was, it was, the record was received by this court on June 10th. It was not assigned to me until, until July 5th, and that was just the file being given to me. So the thirty day, first extension, thirty day briefing period, all but five days, had already gone by the time I got the case.

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Justice Leibson: Well, but, there's some kind of inefficiency—

Justice Gant: This, this, then, the ten points, and I'm sure, I'm sure that Mr. Isaacs is interested in this, because it seems to me that when there's a twenty-five delay, day delay in, in just the assignment, that we're already in trouble. We start—

Mr. Radigan: You can imagine how I feel. I feel like I'm already between a rock and a hard place, when I get assigned some of these appeals.

Justice Gant: You've got an appeal due in five days that you didn't know about?

Mr. Radigan: That's correct.

Justice Gant: And it seems to me, I'm just bringing it up, to hope that that thing can be cured, that when the record is completed, it could certainly be assigned in an expeditious manner, so that you, at least within that first thirty days, know where you are on the case and how long its going to take.

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Mr. Radigan: In this case, I didn't even know the case was coming in until I had five days to brief the case, and I had to file an extension order.

Justice Vance: But this hearing is not regarding that, that delay. This hearing is regarding the reason that you didn't comply with the order to file a brief on a certain date. Do you recall what day you got that order or what day it was entered?

Mr. Radigan: The order, itself, I believe, I received, let's see, it was, originally, due on October 10th. I received the order on the previous Thursday, I believe, and I did receive a telephone call from court personnel that the order was coming out, though.

Justice Vance: And that would be, then, October 7th or something—

Mr. Radigan: Something like that, yes, sir.

Justice Vance: And when was the, when did that order say the brief was due?

Mr. Radigan: On Tuesday, October 11th.

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Justice Vance: You mean the order just gave you four days in which to prepare a brief?

Mr. Radigan: Yes, it does. I believe it was issued on Monday or Tuesday. I did not get it until Wednesday, although, like I said, I did receive a phone call in regard to that matter and was orally informed by telephone that extension order was being entered. But, as I said, I was in the middle of working on a Court of Appeals brief that was filed, eventually, on October 12th or 13th, in which the Court of Appeals told me they were not going to grant any further extensions. And I was, at the time that I received even the telephone communications, I did not have, I was in the middle of preparing that brief at that time,

and I felt that I could not drop that, in which I felt that I was insi—

Justice Vance: You have a choice, then, of either dropping that and obeying this order or making your own election not to obey this order, but to complete the work that you had started for the Court of Appeals, and your choice was to violate the order of this court?

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Mr. Radigan: I felt, your honor, that I either was going to get in trouble with this court or with the Court of Appeals.

Justice Stephenson: Well, you were under—

Mr. Radigan: And I was under—

Justice Stephenson: Under no show cause order from the Court of Appeals?

Mr. Radigan: No, your honor. No, your honor.

Justice Stephenson: You anticipated one?

Mr. Radigan: I anticipated one, based on prior practices of the Court of Appeals.

Justice Aker: In other words, you'd rather have seven people chewing on you than three people.

Justice Stephenson: Mr. Radigan, I, Mr. Radigan, I understand your response. You said something there about attendance at the meeting at—

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Mr. Radigan: At the District Judges Conference, that's correct, your honor. I had been asked, in April of last year, to attend the District Judges Conference on September 14 and provide a lecture for them during that morning. I'm sorry, Justice Leibson, we never got back to your question.

Justice Leibson: I think Justice Gant covered it, which is the, is the, you admitting to this inefficiency in the general, in the office, which I assume to be as much your re-

sponsibility as anybody else's. I don't understand the system whereby the record is filed on the 10th of June and the case is assigned to you on the 5th of July. But that's beside the point. The one thing that I, that I haven't heard any kind of satisfactory explanation for at all is why you knew, why, when you got this order, you knew you couldn't comply with, as you maintain your position, out of respect for this court, you didn't immediately file something with this court telling us the reasons so that, rather than waiting until the day when the brief is due, and then filing still another routine motion for an extension.

Mr. Radigan: I apologize. It was a misjudgment on my part, your honor.

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Justice Aker: Of course, I'm sure it's not true, but it's almost like you're trying to remove from the center of position, rather we had to take a stand. Now. I don't know if you got, you've got Cleaver to protect your clients. I guess you'd have 1983 to protect you from us in certain instances.

Mr. Radigan: I don't like to look at it like that, your honor.

Justice Aker: But we're not a suspicious group, or I'm not. I'll speak for myself, individually, but given the choice of a Court of Appeals and the Supreme Court of this Commonwealth, and the fact that you were under notice, you anticipated to show cause, knowing what they said about Cleaver. So your last extension, your client's still going to be protected. Your client, in fact, is going to be protected here, most likely. So the only recourse we have to try to speed this up is, is again to motivate the attorney. And I, you know, I was disappointed. I'm probably not as upset as most of the members of the court, but I was disappointed. And while I'm at it, we talked,

someone mentioned earlier about someone filing a motion, beforehand, asking for an extension on one of these show causes.

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Well, we just turned around and rejected one of those in motion panel. On Monday, they filed one saying that they couldn't get this done. So you-all probably don't have a copy of the order yet, but I don't know.

Mr. Radigan: The problem, the problem I have, very frankly, let's put it into perspective, as far as myself right now. Because we are in a situation right now in the office, where the office does have the technical responsibility, under the statutes, to handle all these appeals that come in. As I said, we have more appeals and fewer attorneys. We're placing y—, myself, and I'm speaking for myself when I reflect some of the feelings of the other appellant attorneys in the Department of Public Advocacy, to the extent that you're placing us in a situation where we are going to, in order to protect ourselves, have to make a choice when these cases are attempted to be assigned to us, that if we have too many cases at that time, and we are starting to face these show cause orders, we're, to protect ourselves, we're going to have to refuse the assignments from our supervisors, because of ethical reasons. And there's no question that there is, under the code of ethics, obligations to refuse cases you can't handle within

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the time frame. Now, place it into our perspective for a moment, in my perspective, because what we're faced with is very simply the situation where, if I, in order to prevent future occurrences of this, refuse that assignment which I can't do, under the canon of ethics, then what happens to that appeal? What happens to that client? And I don't know. We're facing a crunch right now. We're faced in

a situation where there's been an increase in these appeals and we're, the individual client is, Justice Akers, probably protected under Cleaver, but we're getting to the point, and I can understand, and please accept this, I understand the courts desire to speedily process these appeals. We'd like to process them. I don't like a backlog on my, on my cases. But we simply cannot handle these cases within sixty or ninety days, as it stands right now. And what this type of proceeding is going to do, unless you feel that we're acting in bad faith, and I hope you don't at least for myself, right now, we're going to have to face that decision of rejecting assigned cases from our supervisors. And I know, Mr. Posnansky is head of the Appellant Branch, and Mr. Isaacs is the Public Advocate. Doug does not want that situation to occur. I think what we have to do is reach an

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understanding on these. I can assure you, gentlemen, we are not trying to delay these cases. We have clients in prison, who are wanting to appeal these cases and process them as quickly as possible. I hope you feel that we want to process them as quickly as possible, and that we're not trying to delay the process of justice in this court, or any court. If you felt that way, I feel that condemnation is terribly justified. But what am I supposed to do under these type of circumstances where I've got too many cases, and I might find myself again before this court or the Court of Appeals of Kentucky because of a circumstance that I don't know that I can handle. And what's going to happen to those other cases? I don't know the answers, but it's putting our, putting the entire system that we have going right now, imperfect as it may be, it's putting it into a very grave state of jeopardy because there might be longer de-

lays and more confusion and more litigation, which I don't want, and I know that you don't want.

Justice Aker: Let me ask this question.

Mr. Radigan: Certainly, your honor.

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Justice Aker: If you're found in contempt here, can you appeal it to the Court of Appeals?

Mr. Radigan: To the Court of Appeals of Kentucky?

Justice Aker: Yes.

Mr. Radigan: I don't think so.

Justice Aker: If you're found in contempt in the Court of Appeals, can you appeal it here?

Mr. Radigan: I'd say so, yes.

Justice Aker: You may have made a bad choice.

Mr. Radigan: It's very possible, I have. As I said, I was in the middle of working on that other case, and I could not see dropping it, right in the middle of that to start working on this case. That was perhaps the judgment, or a mistake in judgment, on my part. I don't know. That's for your honors to decide. But I want you to, please, place into perspective what the larger problem is, because I can predict, very safely that either we're going to be having more hearings like this, or we're going to

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have Mr. Isaacs and Mr. Posnansky in a quandry, as to what to do with these backlog cases that the appellant staff, because of ethical considerations, and because of the desire of this court to process these within a certain time period, that we're going to have to start refusing these cases, and I have no idea what's going to happen to those appeals at that time.

Justice Aker: Well, I suspect that the federal courts will start issuing writs, and these people will be going out on the streets. And then, the public will be screaming

at us, and the legislature will be sitting there yelling, ho-hum.

Mr. Radigan: And we're going to be still sitting under a hiring freeze that we can't replace people that we'd like to replace right now. I, gentlemen, it's a mess, there's no question about it. But it's one that I think should be perhaps, if I could suggest, resolved by discussion and working together on these things, rather than grant issues—

Justice Leibson: You've already told us, you have no answers.

Mr. Radigan: Pardon me.

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Justice Leibson: I don't want to discuss, I assume that you're in the middle of this problem and have been for, for a long time, and you've already announced you have no answers. There doesn't seem to be a lot to discuss.

Mr. Radigan: I have, I have some suggestions, if we could hire more attorneys, we'd be in better shape. If we had more money, to the budget, we'd be in better shape.

Justice Stephenson: We have no control over that.

Justice Aker: I think one thing that aggravates some of us, and of course, I know you're under your ethical considerations to do the best job possible, but it's so many of these things, and you-all have heard thousands of times, Mr. Isaacs heard it when we were on that Governor's Task Force and so forth, is the issues raised many times could be more selective. I mean, seems like that half, over half of the briefs are just inane, philosophical, esoteric questions that keep hoping that, maybe some day, it might strike. And I know you're trying to preserve it, but I just, I think there is a little selectivity here that could assist in a whole lot.

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Chief Justice Stephens: I would modify that by saying a whole lot of selectivity.

Justice Leibson: We sometimes read pages and pages of briefs and never do find out what you-all are really trying to, what particular facts that you consider important and what particular issues there are in the case, almost have to start with the argument heads and read the arguments first, and then try and go back through the facts and figure out what you—

Justice Wintersheimer: I don't think that applies necessarily to you, Mr. Radigan.

Mr. Radigan: I think one of the problems we're dealing with right there is the fact that we had, with the prior Supreme Court of Kentucky, several instances where briefs were dismissed because of an insufficient, or remanded and ordered to be refiled because briefs were not, the statement of facts in the briefs, were not considered to be in sufficient detail. I've been here for eight years, eight and a half years, doing appellant work for this court. And in '77 and '78, our original practice was to have an extremely brief statement of the facts of a case and to put most of the factual arguments within the, the issues themselves. We had, we then had—

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Justice Wintersheimer: We had that discussion with Mr. Marshall in the back, in the conference room last month. And it seems, I don't know who we'll have it with in November or December, but we hope that it can stop. You know, maybe, you talk it over.

Mr. Radigan: This is, this is, this is some of the problems that we have. We have situations where different philosophies with different justices bring about, perhaps, different results. And we try to adapt to those situations

and remember the same kinds of problems that we've had before.

Chief Justice Stephens: Well, let me just say something. I, I have been over to the offices on several occasions, as you know, both when I was Attorney General and when, since I've been on the court, I, very frankly, it may not solve this particular problem today, but I am a little disappointed that you waited until Monday. I, if it had been me, I would have filed something the very day I heard about the show cause order. I wouldn't have waited until the following, see that doesn't make, I, I am very aware of Mr. Isaac's talents, and I don't expect him to be a magician. But I do expect that there will be a positive change in the spirit of

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cooperation and hopefully, that some of this court's individual and collective, suggestions will be listened to, try to address the problem. In a very real sense, Mr. Radigan, the Attorney General has a similar problem.

Mr. Radigan: I recognize that, your honor.

Chief Justice Stephens: And somehow they manage to stumble along and take care of things, reasonably well, I guess.

Justice Wintersheimer: It's easier.

Chief Justice Stephens: Yeah, I would like to suggest, if it's alright with the court, that we let, unless there's anymore questions, that we let Mr. Isaacs have just a couple of minutes, because some of us have rumbling stomachs up here. Anymore questions of Mr. Radigan? I'm obviously not trying to cut the discussion off, but it seems we're into sort of policy matters now.

Mr. Isaacs: Thank you. May it please the court. I thank you very much for allowing me to appear before you. I wish that my first introduction to the court had been

under better circumstances, but I do appreciate the opportunity to discuss these issues.

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I'm not making any statements concerning this particular case because many of the issues came up long before I'm there, and I don't feel that it would be proper for me to do so. I did want to come before you and very briefly, because I know the hour, to tell you that I consider this problem extremely serious. The first day I was on the job I found out that there were show cause orders issued to some of my attorneys. I think that my reaction to that, in the office, surprised many of my attorneys because I considered this to be extremely serious. I do not want any of my attorneys held in contempt; and if they're getting show cause orders, I wanted to know immediately, why that was happening. Being new to the job, I did not know the history of what had happened in the past, but I wanted to find out very quickly. I have had my staff, my court staff, the director, and some of the people looking at this issue because I'm extremely concerned about it. I do have problems with hiring freezes, and I have to be creative in solving this. And I don't have any specific proposals to give you today. We're looking at reducing caseloads, different ways of handling appeals, assigning more attorneys, looking at the structure of the office; and to be honest with you, my, my concept is, nothing is

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sacred. We do it, as long as we can do it legally, and we're going to try to find a way to cut down on the extensions of time because I consider it to be a serious problem. And I'm working at it. It's one of my top priorities.

Justice Leibson: Well, one of the Department's problems now, and this, you overlooked it, I'm going to risk a belaboring point. One part of the problem is that the

motion for extension comes in on the day the brief is due. In other words, it isn't a motion at all. It's an order because of the Cleaver or whatever, or we're in a position where we can't deny the motion, and without, in essence, being a release order for the prisoners. Now, we can't tolerate a situation where we don't exercise any judicial discretion. I refuse to sit up here and rubber stamp motions for extension. That's what it comes down to.

Mr. Isaacs: I agree with you one hundred percent. And it's been very enlightening for me to be here this morning because I don't know all the sides of the issue. I will tell you this, when I talked to specific attorneys, I've said to them, if you know you've got a problem, file your motion now. Let the court know. Let them know how much time

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you realistically need. I have had this discussion with specific attorneys. I have advised them on it. And in the Marlowe case, that is what they did. The order that, which I saw yesterday for the first time, that was previously discussed. That is the reason that they did that, was at my suggestion, tell the court exactly what your situation is. And that is the approach that I would favor. But I, what I'm, what I'm saying is, I want to work with the court and my staff to try to resolve these problems. You all have ideas because you deal with this everyday, and I'm willing to listen to any suggestions because I'm trying to make it work, if I can, given what I have, what the legislature has given me, and with what the Governor and the Executive Branch gives me in terms of staff. That's the reason I wanted to appear before you to tell you that I'm concerned about it, and I want to work on this problem. And I need your-all's assistance to tell me the problems tht you're having so I can communicate that to my staff to try to address those problems. And that is a very, I

understand that. My, in the other practice that I've done, that was always my, the way I did it, is that I, if I have a problem, you bring it to the court's attention immediately.

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Justice Aker: Well, maybe Marlowe, one was a little early and the rest of them are a little late.

Mr. Isaacs: Well, maybe that's the case. I don't know. I don't know. But that's, that's you know.

Justice Aker: There's a happy medium somewhere.

Mr. Isaacs: That's, me and you both have to find. But I do appreciate the opportunity to express with you how concerned I am with the problem. I've, I have instituted some internal controls though. As you know, as an attorney supervising attorneys. I don't have any discretion to tell an attorney to or not to file a motion in a particular case. But I've asked them to review these problems with me, personally, when they come up, and to advise me as soon as they know they are going to have a problem, so we can, so I can get some understanding of the full depth of the problem, and maybe, look at some alternatives to solve them. I don't have any answers. I wish I did. But—

Justice Stephenson: Mr. Isaacs, I can suggest at least a partial answer. I suggest that you review some of the motions for discretionary review and some of the

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briefs. And my experience tells me you will find a fair percentage of those are just absolutely without merit, just frivolous. In too many of the briefs, arguable points are inclined to get lost in this plethora of just, points of argument that are absolutely without merit. I think with the amounts of paper you're dealing with that could be, using some judgment, that could be reduced.

Mr. Isaacs: That is one issue that I have already written down in my notes, listening this morning.

Justice Stephenson: I'm glad. I look forward to—

Justice Gant: I'd like to add that I was not a member of the court at the time, but someone suggested that they wanted a larger recitation of the facts but—

Chief Justice Stephens: I think there's only one member here that was—

Justice Aker: And he voted against it.

Justice Gant: But I don't think that that person is no longer on the courts, or alive, as I recall.

Justice Aker: Yeah.

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Justice Wintersheimer: I think that that problem is inherent in your system but also in the Attorney General's system.

Justice Gant: The Attorney General is—

Justice Wintersheimer: Mindless recitation of all these—

Justice Gant: We had one argument before your time. Mr. Radigan was not involved, where your side gave us six pages, the Attorney General eight pages of the facts of the case, of the crime that occurred, and the only argument was about the PFO stage of the trial. What happened, what witness testified that Joe Blow broke into the house, or got caught running down the street, or whatever, had nothing to do with the PFO stage of the thing. And yet we had all that claptrap to go through before we—

Justice Leibson: We know, that the trial comes in, you know, piecemeal, but facts of the brief should not come in piecemeal. But the issue is whether the house was broken into. That issue ought to be stated, and the testimony that relates to that issue ought to immediately be stated on that issue.

Justice Aker: In narrative form.

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Justice Leibson: Right.

Justice Aker: Not witness so and so testified. There you ought to put a reorder on that, anything that looks like a biography, or a diary, of course, not Mr. Geoghegan, but—

Justice Gant: No.

Chief Justice Stephens: I would tell the members of the Court that, as soon as Mr. Isaacs gets his breath, he's probably lost a little of it here today, but as soon as he gets his breath, (inaudible) I'm going to meet with him. And I'm sure that you got some of the message, and I will glean other suggestions and present them to you. Hopefully, that it won't fall on deaf ears as its done in the past.

Mr. Isaacs: I can assure that it won't fall on deaf ears.

Chief Justice Stephens: I wasn't talking about your ears.

Mr. Isaacs: And I can assure you that any message that I get from this court will be set forth loud and clear to my office because we're all part of the same system, and the only way it can work is if we all

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work together. And just to end on a very brief note, that I'm willing to work with you and meet with you at any time concerning any problem concerning my office and look forward to doing so. Thank you all, very much.

Chief Justice Stephens: Anymore questions from members of the court?

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I, Juanita M. Toole, do hereby certify that the foregoing pages are a complete and accurate transcription of the audible testimony at the time and place and in the matter stated in the caption hereof, said proceedings having

been tape recorded by the clerk and subsequently transcribed under my direction.

Witness my signature this March 19, 1984

(s) Juanita M. Toole
Notary Public

My Commission expires 2-17-86

COURT OF APPEALS OF KENTUCKY

No. 83-CA-1340-I

CHARLES FREDERICK GREEN - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Fayette Circuit Court
Action No. 82-CR-664

ORDER

The Court, having considered appellant's motion for an extension of time in which to perfect the appeal, there being no response thereto, and having been otherwise sufficiently advised, ORDERS that the motion be, and it is hereby, GRANTED, to and including September 15, 1983. No further motions for an extension of time to perfect the appeal will be granted.

ENTERED: 9-7-83

(s) John P. Hayes
Honorable John P. Hayes
Chief Judge, Court of Appeals

COURT OF APPEALS OF KENTUCKY

No. 83-CA-1340-I

CHARLES FREDERICK GREEN - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Fayette Circuit Court
Action No. 82-CR-664

ORDER

BEFORE: DUNN, HOWARD and MCDONALD, JUDGES.

It is ORDERED that the appellant's motion for an extension of time in which to file his brief be, and is hereby, GRANTED. It is further ORDERED that the appellant's motion for leave to file a brief in excess of twenty-five (25) pages be, and it is hereby, GRANTED. Appellant's brief is ORDERED filed on the date of entry of this order.

ENTERED: 10-31-83

(s) Wm. R. Dunn
Judge, Court of Appeals

SUPREME COURT OF KENTUCKY

File No. 83-SC-552-I

JOSEPH HERALD - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

MOTION AND AFFIDAVIT FOR EXTENSION OF TIME TO FILE BRIEF AND PERFECT THE APPEAL—
Filed July 11, 1983

Comes now the appellant, Joseph Herald, by counsel, and respectfully requests an extension of thirty (30) days in which to file the Brief for Appellant and perfect the appeal in the above-captioned case. As grounds for this Motion, the appellant states as follows:

1. During the past thirty (30) days, the undersigned counsel has filed numerous appellate pleadings within the state and federal appellate systems, including briefs filed on June 17 (Supreme Court of Kentucky) and June 27 (Court of Appeals of Kentucky), and July 11, 1983 (United States Court of Appeals for the Sixth Circuit).

2. Even though the record on appeal was received by the Clerk of this Court on June 10, 1983, the above-captioned appeal was not assigned to the undersigned counsel until Tuesday, July 5, 1983. Consequently, the undersigned counsel has had less than one (1) week, not thirty (30) days, to work on appellant's case.

3. It should be additionally noted that the Department of Public Advocacy has placed severe restrictions on the

amount of time that the undersigned counsel can spend on his work. Effective October 1, 1982, a new policy was adopted which states, in pertinent part, that "no overtime will be permitted in the Department of Public Advocacy except in actual emergencies and in those cases the overtime *must* be authorized in advance" (emphasis in original). In effect, the Department of Public Advocacy has limited the undersigned counsel to thirty-seven and one-half (37.5) hours of work per week.

4. Under *Anders* v. *California*, 386 U. S. 738, 78 S. Ct. 1395, 1400, 18 L. Ed. 2d 943 (1967), appointed counsel's "role as advocate requires that he support his client's appeal to the best of his ability." Under our adversary system, it has been a well-established principle that there is no substitute for counsel who acts as an advocate and who makes the best arguments he can on the facts and the law. *High* v. *Rhay*, 519 F. 2d 109, 113 (9th Cir. 1973), citing *Anders* v. *California*, *supra*. Accordingly, when an appointed counsel in a criminal appeal because of his total volume of work is unable to devote sufficient time to complete a professionally competent appellate brief within the allotted time period, his only recourse is to seek an extension of time from the appellate court. If the appointed counsel declines to request an extension and instead files a perfunctory brief, the indigent appellant is denied the effective assistance of counsel on appeal, a right which he is guaranteed by the Sixth Amendment.

5. This motion is made in good faith and not for the reason of delay.

6. The applicant is not free on bond pending appeal, but rather is incarcerated at the Kentucky State Reformatory at LaGrange.

WHEREFORE, the appellant respectfully requests this Court to grant an extension to and including August 10, 1983, in which to file his Brief for Appellant and perfect the appeal.

Respectfully submitted,

(s) William M. Radigan
William M. Radigan
Assistant Public Advocate
Department of Public Advocacy
State Office Building Annex
Frankfort, Kentucky 40601

Subscribed and sworn to before me by William M. Radigan on this 11th day of July, 1983.

(s) Patsy C. Shryock
Notary Public—State at Large

My Commission expires: 11/21/84

NOTICE

Please take notice that a copy of the foregoing Motion will be filed in the Office of the Clerk of the Supreme Court of Kentucky on this 11th day of July, 1983.

(s) William M. Radigan

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for appellant has been hand delivered to Honorable Steven L. Beshear, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 11th day of July, 1983.

(s) William M. Radigan

SUPREME COURT OF KENTUCKY

83-SC-552-I

JOSEPH HERALD - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Campbell Circuit Court
Honorable Thomas F. Schnorr, Judge
83-CR-010

ORDER GRANTING EXTENSION

Appellant's motion for an extension of time, to and including August 10, 1983, in which to file his brief and perfect the appeal in the above-styled action is granted.

ENTERED July 29, 1983.

(s) Robert F. Stephens
Chief Justice

SUPREME COURT OF KENTUCKY

File No. 83-SC-552-I

JOSEPH HERALD - - - - - - - *Appellant*

v.

COMMONWE'LTH OF KENTUCKY - - - *Appellee*

MOTION AND AFFIDAVIT FOR EXTENSION OF TIME TO FILE BRIEF AND PERFECT THE APPEAL—
Filed August 10, 1983

* * * * * * * *

Comes now the appellant, Joseph Herald, by counsel, and respectfully requests an extension of thirty (30) days in which to file the Brief for Appellant and perfect the appeal in the above-captioned case. As grounds for this Motion, the appellant states as follows:

1. During the past thirty (30) days, the undersigned counsel has filed numerous appellate pleadings within the state and federal appellate systems, including briefs on July 11 (United States Court of Appeals for the Sixth Circuit), July 25 (Court of Appeals of Kentucky), and August 9, 1983 (Court of Appeals of Kentucky).

2. Even though the record on appeal was received by the Clerk of this Court on June 10, 1983, the above-captioned appeal was not assigned to the undersigned counsel until Tuesday, July 5, 1983.

3. It should be additionally noted that the Department of Public Advocacy has placed severe restrictions on the amount of time that the undersigned counsel can spend on his work. Effective October 1, 1982, a new policy was adopted which states, in pertinent part, that "no overtime

will be permitted in the Department of Public Advocacy except in actual emergencies and in those cases the overtime *must* be authorized in advance" (emphasis in original). In effect, the Department of Public Advocacy has limited the undersigned counsel to thirty-seven and one-half (37.5) hours of work per week.

4. Under *Anders* v. *California*, 386 U. S. 738, 78 S. Ct. 1395, 1400, 18 L. Ed. 2d 943 (1967), appointed counsel's "role as advocate requires that he support his client's appeal to the best of his ability." Under our adversary system, it has been a well-established principle that there is no substitute for counsel who acts as an advocate and who makes the best arguments he can on the facts and the law. *High* v. *Rhay*, 519 F. 2d 109, 113 (9th Cir. 1973), citing *Anders* v. *California, supra*. Accordingly, when an appointed counsel in a criminal appeal because of his total volume of work is unable to devote sufficient time to complete a professionally competent appellate brief within the allotted time period, his only recourse is to seek an extension of time from the appellate court. If the appointed counsel declines to request an extension and instead files a perfunctory brief, the indigent appellant is denied the effective assistance of counsel on appeal, a right which he is guaranteed by the Sixth Amendment.

5. This motion is made in good faith and not for the reason of delay.

6. The appellant is not free on bond pending appeal, but rather is incarcerated at the Kentucky State Reformatory at LaGrange.

WHEREFORE, the appellant respectfully requests this Court to grant an extension to and including September 9, 1983, in which to file his Brief for Appellant and perfect the appeal.

Respectfully submitted,

(s) William M. Radigan
Assistant Public Advocate
Department of Public Advocacy
State Office Building Annex
Frankfort, Kentucky 40601

Subscribed and sworn to before me by William M. Radigan on this 10th day of August, 1983.

(s) Peggy S. Redmon
Notary Public—State at Large

My Commission expires: December 9, 1985

NOTICE

Please take notice that a copy of the foregoing Motion will be filed in the Office of the Clerk of the Supreme Court of Kentucky on this 10th day of August, 1983.

(s) William M. Radigan

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for appellant has been hand delivered to Honorable Steven L. Beshear, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 10th day of August, 1983.

(s) William M. Radigan

SUPREME COURT OF KENTUCKY

83-SC-552-I

JOSEPH HERALD - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Campbell Circuit Court
Honorable Thomas F. Schnorr, Judge
83-CR-010

ORDER GRANTING EXTENSION

Appellant's motion for an extension of time, to and including September 9, 1983, in which to file his brief and perfect the appeal in the above-styled action is granted.

ENTERED August 24th, 1983.

(s) Robert F. Stephens
Chief Justice

SUPREME COURT OF KENTUCKY

File No. 83-SC-552-I

JOSEPH HERALD - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

MOTION FOR EXTENSION OF TIME TO FILE BRIEF AND PERFECT THE APPEAL

Filed September 9, 1983

• • • • • • • •

Comes now the appellant, Joseph Herald, by counsel, and respectfully requests an extension of thirty (30) days in which to file the Brief for Appellant and perfect the appeal in the above-captioned case. As grounds for this Motion, the appellant states as follows:

1. During the past thirty (30) days, the undersigned counsel has filed numerous appellate pleadings within the state and federal appellate systems, including briefs filed on August 12 (Supreme Court of Kentucky), August 18 (United States District Court for the Eastern District of Kentucky), August 19 (United States District Court for the Western District of Kentucky), and September 7, 1983 (Supreme Court of Kentucky).

2. Even though the record on appeal was received by the Clerk of this Court on June 10, 1983, the above-captioned appeal was not assigned to the undersigned counsel until Tuesday, July 5, 1983.

3. It should be additionally noted that the Department of Public Advocacy has placed severe restrictions on the amount of time that the undersigned counsel can spend on

his work. Effective October 1, 1982, a new policy was adopted which states, in pertinent part, that "no overtime will be permitted in the Department of Public Advocacy except in actual emergencies and in those cases the overtime *must* be authorized in advance" (emphasis in original). In effect, the Department of Public Advocacy has limited the undersigned counsel to thirty-seven and one-half (37.5) hours of work per week.

4. Under *Anders* v. *California,* 386 U. S. 378, 78 S. Ct. 1395, 1400, 18 L. Ed. 2d 943 (1967), appointed counsel's "role as advocate requires that he support his client's appeal to the best of his ability." Under our adversary system, it has been a well-established principle that there is no substitute for counsel who acts as an advocate and who makes the best arguments he can on the facts and the law. *High* v. *Rhay,* 519 F. 2d 109, 113 (9th Cir. 1973), citing *Anders* v. *California, supra.* Accordingly , when an appointed counsel in a criminal appeal because of his total volume of work is unable to devote sufficient time to complete a professionally competent appellate brief within the allotted time period, his only recourse is to seek an extension of time from the appellate court. If the appointed counsel declines to request an extension and instead files a perfunctory brief, the indigent appellant is denied the effective assistance of counsel on appeal, a right which he is guaranteed by the Sixth Amendment.

5. This motion is made in good faith and not for the reason of delay.

6. The appellant is not free on bond pending appeal, but rather is incarcerated at the Kentucky State Reformatory at LaGrange

Wherefore, the appellant respectfully requests this Court to grant an extension to and including October 9,

1983, in wihch the file his Brief for Appellant and perfect the appeal.

Respectfully submitted,

(s) William M. Radigan
Assistant Public Advocate
Department of Public Advocacy
State Office Building Annex
Frankfort, Kentucky 40601

NOTICE

Please take notice that a copy of the foregoing Motion will be filed in the Office of the Clerk of the Supreme Court of Kentucky on this 9th day of September, 1983.

(s) William M. Radigan

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for appellant has been hand delivered to Honorable Steven L. Beshear, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601 this 9th day of September, 1983.

(s) William M. Radigan
by MAP

SUPREME COURT OF KENTUCKY

83-SC-552-I

JOSEPH HERALD - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

On Appeal from Campbell Circuit Court
Honorable Thomas F. Schnorr, Judge
83-CR-010

ORDER

Appellant's motion for an extension of time is granted. Appellant shall file his brief and perfect the appeal in the above-styled action on or before October 11, 1983.

If appellant's brief is not filed on or before October 11, 1983, counsel for the appellant shall appear before this court on October 24, 1983, at 10:30 a.m., in order to show cause why appellant's counsel should not be held in contempt of this court for failure to timely file the brief.

Stephenson, Vance, Wintersheimer and Aker, JJ., sitting. All concur.

ENTERED October 3, 1983.

(s) Robert F. Stephens
Chief Justice

SUPREME COURT OF KENTUCKY

File No. 83-SC-552-I

JOSEPH HERALD - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

MOTION AND AFFIDAVIT FOR EXTENSION OF TIME TO FILE BRIEF AND PERFECT THE APPEAL—Filed October 1, 1983

Comes now the appellant, Joseph Herald, by counsel, and respectfully requests an extension of ten (10) days in which to file the Brief for Appellant and perfect the appeal in the above-captioned case. As grounds for this Motion, the appellant states as follows:

1. During the past thirty (30) days, the undersigned counsel has filed numerous appellate pleadings within the state and federal systems, including a brief filed with the United States Court of Appeals for the Sixth Circuit on September 28, 1983. Additionally, the undersigned counsel has completed a brief which is scheduled to be filed with the Court of Appeals of Kentucky on Wednesday, October 12, 1983. During this same period, the undersigned counsel has had two (2) oral arguments and one (1) trial in the Clay Circuit Court. Finally, the undersigned counsel participated in the 1983 District Judges Training Conference on September 14, 1983.

2. Even though the record on appeal was received by the Clerk of this Court on June 10, 1983, the above-captioned appeal was not assigned to the undersigned counsel until Tuesday, July 5, 1983.

3. It should be additionally noted that the Department of Public Advocacy has placed severe restrictions on the amount of time that the undersigned counsel can spend on his work. Effective October 1, 1982, a new policy was adopted which states, in pertinent part, that "no overtime will be permitted in the Department of Public Advocacy except in actual emergencies and in those cases the overtime *must* be authorized in advance" (emphasis in original). In effect, the Department of Public Advocacy has limited the undersigned counsel to thirty-seven and one-half (37.5) hours of work per week.

4. Under *Anders* v. *California*, 386 U. S. 378, 78 S. Ct. 1395, 1400, 18 L. Ed. 2d 943 (1967), appointed counsel's "role as advocate requires that he support his client's appeal to the best of his ability." Under our adversary system, it has been a well-established principle that there is no substitute for counsel who acts as an advocate and who makes the best arguments he can on the facts and the law. *High* v. *Rhay*, 519 F. 2d 109, 113 (9th Cir. 1973), citing *Anders* v. *California*, *supra*. Accordingly, when an appointed counsel in a criminal appeal because of his total volume of work is unable to devote sufficient time to complete a professionally competent appellate brief within the allotted time period, his only recourse is to seek an extension of time from the appellate court. If the appointed counsel declines to request an extension and instead files a perfunctory brief, the indigent appellant is denied the effective assistance of counsel on appeal, a right which he is guaranteed by the Sixth Amendment.

5. This motion is made in good faith and not for the reason of delay.

6. The appellant is not free on bond pending appeal, but rather is incarcerated at the Kentucky State Reformatory at LaGrange.

WHEREFORE, the appellant respectfully requests this Court to grant an extension to and including October 21, 1983, in which to file his Brief for Appellant and perfect the appeal.

Respectfully submitted,

(s) William M. Radigan
William M. Radigan
Assistant Public Advocate
Department of Public Advocacy
State Office Building Annex
Frankfort, Kentucky 40601

Subscribed and sworn to before me by Wililam M. Radigan on this 11th day of October, 1983.

(s) Patsy C. Shryock
Notary Public—State at Large

My Commission expires: 11/21/84

NOTICE

Please take notice that a copy of the foregoing Motion will be filed in the Office of the Clerk of the Supreme Court of Kentucky on this 11th day of October, 1983.

(s) William M. Radigan

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for appellant has been hand delivered to Honorable Steven L. Beshear, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 11th day of October, 1983.

(s) William M. Radigan

END OF DOCKET